Central Law Journal.

ST. LOUIS, MO., MARCH 30, 1917.

CONSTITUTIONALITY OF NEW YORK'S COMPULSORY WORKMEN'S COMPENSATION ACT.

The constitutionality of optional workmen's compensation laws has been upheld. The question of the constitutionality of a compulsory act has not heretofore been passed upon. A late decision by our Supreme Court decides this question and holds a compulsory law within the state's police power. N. Y. Cent. R. Co. v. White, 37 Sup. Ct. —.

The opinion is by Justice Pitney, who quotes from two recent opinions by the court as to the free right of contract and arbitrary interference therewith being "a substantial impairment of liberty in the long established constitutional sense." (Coppage v. Kansas, 236 U. S. 1), and of the right to work for a living in the common occupations of the community being "of the very essence of the personal freedom" the Fourteenth Amendment intended to secure (Truax v. Raich, 239 U. S. 33).

He then says: "It is not our purpose to qualify or weaken either of these declarations in the least. And we recognize that the legislation under review does measurably limit the freedom of employer and employe to agree respecting the terms of employment, and that it cannot be supported except on the ground that it is a reasonable exercise of the police power of the state. In our opinion it is fairly supportable upon that ground. And for this reason: The subject-matter in respect of which freedom of contract is restricted is the matter of compensation for human life or limb lost or disability incurred in the course of hazardous employment, and the public has a direct interest in this as affecting the common welfare."

Volumes might be written on the subject of freedom of contract and the right to the pursuit of life, liberty and happiness, but no more comprehensive statement of its subordination to police power, when the exercise of such rights places one in a situation where rights of society have claims on it can be found.

It is a matter of option whether one will contract in a certain way or will refuse to contract in that way. If to contract he places himself in a class where some public right is affected, he has the same right to the inviolability of the latter right as any other person. The principle announced is wrapped up in the maxim *sic utere tuo ut alienum non laedas.*

The justice says: "It cannot be doubted that the state may prohibit and punish self-maiming and attempts at suicide; it may prohibit a man from bartering away his life or his personal security; indeed, the right to these is often declared in bills of right to be 'actual and inalienable;' and the authority to prohibit contracts made in derogation of a lawfully established policy of the state respecting compensation for accidental death or disabling personal injury is equally clear."

At bottom it is to be thought that hardly have we a right that is absolute. All our rights are relative and whatsoever measure of restriction is placed upon them is the penalty paid to government to protect what remains. If one can forfeit to society his life or his liberty for what he may do to another or his property, why need to urge he has any other right that is absolutely inviolable by society's command? We have title to property, but society takes it *in invitum* for taxes or in eminent domain. We have the right to will it away or donate it freely, but society tells how this must be done. We have the right to walk the streets, but if we spread infection, we may be confined. We may open our windows to the healing breeze, but if this harms those within or without our walls, we may be made to shut it out. *Sic utere tuo ut alienum non laedas*—use your own but not to your neighbor's hurt.

NOTES OF IMPORTANT DECISIONS.

TRADE-MARK AND TRADE-NAME—BOTTLING PROTECTED PRODUCT SOLD IN BULK.—In Coca Cola Co. v. Bennett, 238 Fed. 513, decided by Eighth Circuit Court of Appeals, it is held that a manufacturer in bulk of a syrup, which it sells only to certain companies who may prepare it according to a formula for bottling, that is to say, by the addition of carbonated water according to directions by the manufacturer, and then sell the bottled product under manufacturer's trade-mark, may enjoin another from bottling the product sold by manufacturer and selling it under manufacturer's trade-mark.

There are several cases cited in support of this ruling on the theory of this being unfair competition. One of the reasons is that: "Unless the manufacturer can control the bottling, he cannot guarantee that it is the genuine article prepared by him." Another that, "he cannot tell whether it is bottled in so careful a manner as is essential to the preservation of the article and the maintenance of its good reputation." The court also says it "would open the door to any person or corporation to adulterate the beverage sold as Coca Cola without any right in the (manufacturer) to prevent it."

Against all of this theory, if it be admitted that one having a trade-marked article has the right to do any more than sue when a spurious imitation is palmed off on the public as genuine, appear two decisions, one of packaging and the other bottling a trade-marked product, as they came from the factory and in this form selling same under the trade-mark. This was held allowable. Russia Cement Co. v. Frauenhar, 133 Fed. 518, 66 C. C. A. 500; Appolinaris Co. v. Scherer, 27 Fed. 18.

The court said: "If the defendants in this case had simply resold the syrup, it would be within the reasoning of the cases cited; but they did not do this. They changed the syrup into a beverage, and they say that they changed it in the same manner that the appellant authorized other persons to do. But the trouble with this argument is that it destroys appellant's exclusive right to its trade-mark and the resulting right to say who may use it."

We think a trade-mark right ought not to be superior to a patent right and when one purchases a trade-marked article, the seller loses his right to say how he shall use it. If he resells it under its trade-mark name, is it to be said that combination with another substance has made it another thing?

Also, conceding this to be so, yet, if the manufactured article is intended to be sold for use, not as a plain syrup, whether bottled or unbottled, and under its trade-mark, but in combination with water, carbonated or uncarbonated, and under its trade-mark name, may manufacturer object that the manner of combination is not followed in the resale? The fact that it is well-known that this syrup is sold at soda water fountains, generally with water combined with it, is strong evidence the other way. If one may buy the syrup in bulk and mix it as he pleases for sale at a soda fountain, is not the presumption present that the manufacturer blows hot and blows cold when he says a bottler not following his directions takes away something in the way of ready evidence to show a bottler may be infringing his trademark? One has no vested rights in a rule of evidence.

BANKRUPTCY—NEW PROMISE TO PAY UNPAID PORTION OF DEBT IN ENFORCED COMPOSITION.—In Spann v. Read-Phosphate Co., 238 Fed. 338, decided by Fourth Circuit Court of Appeals Court, a decision by district court that a mortgage given for the entire debt against a former bankrupt, which debt was awarded a percentage or dividend in an enforced composition was without consideration to support it, was reversed.

The district court said: "It may be that a bankrupt has the right, under the aspect of some moral obligation, notwithstanding his bankruptcy, afterwards to pay his debts in full. There is a difference, however, between paying in full in the case of a simple bankruptcy and in the case where a composition has been ordered and the debt subsequently paid in full has been used to force other creditors by means of a composition to accept less than their debts. No creditor voting to enforce a composition has a right in any way, shape, guise or pretense, after forcing his fellow-creditors to accept a composition, to afterwards have his debt paid in full. The debt is completely discharged. Any payment thereafter made by the bankrupt is a pure donation, and this donation cannot be made under the rules of law to the prejudice of any creditors, whether past or existing."

The Circuit Court of Appeals refers to Zavelo v. Reeves, 227 U. S. 623, Ann. Cas. 1914D, 664, as in its reasoning negativing the distinction between an ordinary discharge in bankruptcy and one where assets are distributed by an enforced composition. The principle of moral obligation supporting a new promise to pay is the same in one case as in the other, there being no fraud in bringing about the composition.

The district court proceeded on the theory, that, notwithstanding the right of a creditor to urge and vote for a composition, there arose a sort of estoppel in his doing this. But the question appears to us to be one purely of business judgment in the adoption of a course to the best advantage of creditors . The bankrupt offers a composition which will save his assets and the creditors accept the offer, instead of insisting that they be sold. If the statute affords an option to them, there should arise no estoppel as to the course they take.

The judgment below was modified so as to declare the mortgage without consideration, to the extent of the 25 per cent dividend paid in the composition, provided that had not been accounted for already.

INTERNATIONAL LAW — PRIZE TAKEN BY BELLIGERENT ON THE HIGH SEAS, BROUGHT INTO NEUTRAL PORT.—In Berg v. British & A. S. Nav. Co., 37 Sup. Ct. —, the case of the Appam, a vessel of English registry and ownership, was brought into an American port by a German officer, put in charge of her by the captain of the Moewe, a cruiser of the German navy, which had captured the Appam on the high seas. The English owner brought an action in a United States court for her possession against the officer in charge of her.

The officer and the vice-consul of the German Empire, also made defendant, set up in behalf of their government rights under international law and a treaty between our government and Germany, asserted to accord asylum to the latter for prizes captured by its ships as a belligerent.

Justice Day, speaking for the court, said there was nothing in the treaty appealed to that differentiated this capture from the general principles of international law, and the attempt to make of our harbors a refuge for an indefinite time of prizes captured by a belligerent constituted a breach of neutrality. This breach rendered the prize subject to suit brought by the true owner in our courts.

The question of jurisdiction in our courts was determined according to practice in our government in the beginning, allowing the owner, rather than his government to sue. Quoting from Justice Story, it was said: "If, indeed, the question were entirely new, it would deserve very grave consideration, whether a claim founded on a violation of our neutral jurisdiction could be asserted by private persons, or in any other manner than a direct intervention of the government itself."

But the point most strongly stressed in this case was that the prize was not brought here as to the nearest port after capture or to remain for such a time as necessary to relieve distress, but our ports were sought to be used in a permanent way for the storage of prizes for an indefinite time. This, it was held, could not be done.

DIVORCE—EFFECT OF DECREE UPON SEPARATION AGREEMENT FOR SUPPORT. —In Hertz v. Hertz, 161 N. W. 402, decided by Supreme Court of Minnesota, practical construction is invoked as to meaning of an agreement of separation for monthly payments by the husband to be made to his wife during her natural life "or while this separation continues."

The court said: "The argument is that 'this separation,' that is, the separation provided for in the agreement, did not continue after the divorce was granted. This is plausible, but rather technical. It seems to us that the intention was to provide for the wife's support during her life or while the parties continued to live apart. This is quite strongly borne out by the fact that the divorce judgment was entirely silent as to any provision for the wife's support and as to the property rights of the parties."

The divorce was obtained by the wife, and it seems to us very plain, that in suing for it she abandoned the status in the agreement provided for. That the judgment in the action for divorce was silent on the subject of property rights was merely a conclusion by the wife as to the meaning of the separation agreement—it was nothing acted upon by both parties. Just as all rights ceased upon death of the wife under the agreement, so it seems they ceased upon termination of its terms by the divorce. The consideration moving for continued support of the agreement ceased by the wife's act in obtaining an absolute divorce.

APPOINTING ADDITIONAL JUDGES AS A MEANS OF DISPLACING SERVING JUDGES.

Judging from recent newspaper reports, a most remarkable bill has received the approval of the Lower House of Congress, and has been forwarded to the Upper House for their consideration, where it is now on the tapis, or has already received the Senatorial consideration and approval, thus, when signed by the executive, passing beyond its embyro stage and becoming a full-fledged law, which in substance contains the provisions to be presently noticed.

The Constitution of the United States has ordained that judges of the United States courts shall hold their offices during good behavior. Subsequent congressional legislation has provided that where a federal judge has reached the age of seventy years, having served ten years on the bench, he is at liberty to retire from office upon full pay.

The bill above mentioned makes provision that the President, in such cases, shall appoint what are termed "*additional judges*," who, upon being appointed, shall take "*precedence*" of the serving judge, and, of course, it will follow, "as night follows day," that as two bodies cannot occupy the same space at the same time, that the latter is displaced and disqualified from further holding office; relegated to the discard and other useless lumber of the court room, as much so as if the bill in question had thus in terms so declared.

Had Congress thus in terms declared, to-wit: That the serving judge should no longer hold or possess any jurisdiction to try causes in the court where he now sits, who could doubt for a moment that such law was a bill of attainder, i. e., was a legislative judgment which inflicts punishment without a judicial trial?

It was ruled in Cummings Case, 4 Wal. 277, that disqualification from office or from the pursuit of a lawful avocation by a legislative act is a punishment. Here the disqualification of the serving judge is too plain for argument. *Res ipsa loquitur.* And the fact that a subterfuge is employed and a circumlocution resorted to by the congressional draftsman does not rob the present bill of its attainderous hue and complexion.

Would the act accomplish a result which the Constitution forbids? If so, no matter what may be the form of the act, it is unconstitutional. Green v. Biddle, 8 Wheat. 1; Bronson v. Kiwzie, 1 How. 311; McCracken v. Hayward, 2 How. 608; The Pasenger Cases, 7 How. 283.

These legislative judgments which deprive a man of any right he possesses, are condemned and denounced as bills of attainder, because they do not constitute due process of law; "the general law of the land; a law which hears before it condemns; which proceeds upon inquiry and renders judgment only after trial," as stated by Daniel Webster in the Dartmouth College Case. It was attempted indeed in the Cummings Case (successfully in the lower court), to limit the words of the United States Constitution strictly to the very words: "Life, liberty and property." But Mr. Justice Field declared in delivering the opinion of the court: "We do not agree with the counsel of Missouri that to punish one is to deprive him of life, liberty or property, and that to take from him anything less than these is no punishment at all. The learned counsel does not use these terms—life, liberty and property—as comprehending every right known to the law. He does not include under liberty, freedom from outrage on the feelings as well as restraints on the person. He does not include under property, those estates which one may acquire in professions."

Another objection appears on the face of this bill. The President has no power to anticipate a vacancy and make an appointment in advance to fill it. Black Const. Law 114; McCary, Elect., § 257.

If the Constitution fixes the term of office, such term may not be changed by the legislature. 29 Cyc. 1396 and Cas. cit. This change is clearly contemplated and intended by the legislation in question. It disqualifies a judge from further holding his office by a legislative judgment without judicial trial, and then by a similar legislative process, despite the Constitution, declares a vacancy in such office, and fills it with what is termed an "*additional judge.*"

By the same token, if such legislation is to stand the test of judicial scrutiny, then similar legislation will be in order, providing "additional judges" of the Supreme Court of the United States, where a judge has attained the age of seventy years, having served ten years on that bench.

T. A. SHERWOOD.

Long Beach, California.

NATIONAL EMPLOYERS' LIABILITY ACT — PART II — SPECIAL PROVISIONS.

In Part I of this article the general provisions of the law were discussed.* In this concluding article the special provisions are considered.

Safety Appliance Acts.—The act expressly preserves the provisions of all safety appliance acts enacted by Congress, and abolishes the rule of assumption of risk, when the injury was caused by the failure of the railroad company to comply with the provisions of any statute enacted for the safety of employes, and such failure contributes to the injury or death of the employe. The liability under the Safety Appliance Acts is absolute, and considerations of convenience, practicability or expediency are not permitted to lessen the commendable purpose of these acts.[54]

It has been contended that the words "any statute enacted for the safety of employes" in the act, include the statutes of the state where the injury occurred, and it was so held by the Supreme Court of North Carolina in Seaboard Air Line Co. v. Horton,[55] but on writ of error the Supreme Court of the United States reversed the North Carolina court.[56] This construction of the act was reaffirmed in Southern Railway Company v. Crockett, and other cases decided at this term. Thus, it is now authoritatively settled that these words apply only to the safety acts of Congress and not state statutes, although the language of the act seems broad enough to cover both.

Contributory Negligence as a Defense.—The Safety Appliance Act does not abolish contributory negligence as a defense.[57] In that case it was held that contributory negligence is a complete defense under the Safety Appliance Act. But the cause of action in that case arose before the enactment of either of the Employers' Liability Acts. By the Employers' Liability Act the defense of contributory negligence is entirely abolished, if the proximate or contributing cause of the injury is the failure of the railroad company to comply with the requirements of any of the safety acts of Congress.[58] In such a case the assumption of risk is abolished. But assumption of risk is not abolished in cases other than violations of the safety acts.[59] The distinction between contributory negligence and assumption of risk must not be overlooked, although frequently confounded. In Seaboard Air Line Company v. Horton, this distinction is fully considered on page 503.

But the act only imposes an absolute liability on the carrier, if the violation of any safety appliance statutes enacted by Congress was the proximate or contributing cause of the injury.[60]

Hours of Service Act.—Is an injury caused by reason of the violation of the Hours of Service Law[61] within the meaning of the provision which imposes an absolute liability on the carrier if the failure to comply with the requirements of the safety act contributes to the injury, regardless of the employe's contributory negligence?

This act is not expressly mentioned in the act of 1908, but as it has been held that

*This is the second installment of United States Circuit Judge Trieber's article on the National Employers' Liability Act. The first part appeared in Cent. L. J., 84, p. 211.

(54) St. Louis, I. M. & S. Ry. Co. v. Taylor, 210 U. S. 281; Chicago, B & Q. R. R. Co. v. United States, 220 U. S. 559.

(55) 162 N. C. 77.

(56) 233 U. S. 492.

(57) Schlemmer v. Buffalo, etc., Ry. Co., 220 U. S. 590.

(58) Grand Trunk Railway Company v. Lindsay, 233 U. S. 42, 49; Johnson v. Great Northern Railway Company, 178 Fed. 643, 102 C. C. A. 89 (8th Ct.).

(59) Toledo, etc., R. R. Co. v. Slavin, 236 U. S. 454.

(60) St. Louis, I. M. & S. Ry. Co. v. McWhirter, 229 U. S. 265 (reversing the Court of Appeals of Kentucky, 145 Ky. 42), where the Hours of Service Act was involved; Donegan v. Baltimore, etc., R. R. Co., 165 Fed. 869, 91 C. C. A. (2d Ct.) 555; Erie R. R. Co. v. Russell, 183 Fed. 722, 106 C. C. A. (6th Ct.) 160.

(61) 34 Stat. 1415.

these acts should be liberally construed in order to carry out the intention of Congress to protect employes engaged in this hazardous occupation from injuries or death, which, as shown by the statistics of the Interstate Commerce Commission, are very numerous,[62] there is no reason, that I can conceive, why this act should not be held to be a safety act, and a violation thereof, or any other safety act of Congress, if the violation is the proximate or contributing cause of the injury, held to be within the meaning of the law, in view of the language used in section 3, "where the violation of *any statute for the safety of employes*, contributed to the death or injury of the employe." The same rule no doubt applies to the Ashpan Law and the Locomotive-Boiler Inspection Act.

In Schweig v. Chicago, M. & St. P. Ry. Co.,[63] the United States Circuit Court of Appeals for the Eighth Circuit held that one employed in the feed yards of an interstate railroad, helping to unload stock from cars for the purpose of feeding and resting them and then reloading them, and was injured while permitted to remain on duty for more than sixteen hours, in violation of the Hours of Service Act, is not entitled to recover under the provisions of the act, which relieves an employe of assumption of risk under the provisions of the Employers' Liability Act, although it was held that he was engaged in interstate commerce. At first blush this conclusion of the court may seem in conflict with the rulings in the cases hereinbefore referred to, but the court properly distinguished them. Section 1 of the Hours of Service Act provides: "The term 'employes,' as used in this act, shall be held to mean persons actually engaged in or connected with the movement of any train." Therefore, while the employe in that case was engaged in interstate commerce, he was not "actually engaged in or connected with the movement of any train," as required by that act. The provisions of the Employers' Liability Act and the Hours of Service Act differ in that respect. In the former the language is "while he is employed by such carrier in such commerce," without limiting it to employment "connected with the movement of any train."

The liability imposed by the act for injuries caused by defects in cars, engines, appliances and other equipment, is limited to the appliances mentioned in the act; as to all others the liability is limited to negligence only, and excludes responsibility for defects and insufficiency not attributable to negligence. The burden of proving negligence in the latter instance is still on the plaintiff, as required by the common law.[64]

When the Complaint Fails to Show That the Cause of Action Arose Under the Act of Congress.—The fact that the complaint asserts a cause of action under a state law, without making reference to the act of Congress, even if it refers to the state law, is immaterial, so far as to affect the liability under the act of Congress, if the facts set out in the complaint show that the cause of action is in fact within the provisions of the act of Congress. In Missouri, K. & T. Ry. Co. v. Wulf,[65] the court said:

"The reference actually made to the Kansas statute no more vitiated the pleadings than a reference to any other repealed statute could have done."

The same rule applies if, at the trial, the evidence shows that the injury was sustained while the employe was engaged on an interstate train, although neither the complaint nor answer pleaded the act, if it is invoked by a requested instruction.[66]

(62) Johnson v. Southern Pacific Railway Company, 196 U. S. 1.

(63) 216 Fed. 750.

(64) Seaboard Air Line Company v. Horton, supra, reversing the ruling of the Supreme Court of North Carolina (162 N. C. 77), which held the liability to be absolute as to defects in all appliances. This was reaffirmed in Southern Ry. Co. v. Crockett.

(65) 226 U. S. 570.

(66) Seaboard Air Line Ry. Co. v. Duvall, 225 U. S. 477, 482; St. Louis, I. M. & S. Ry. Co. v. Hesterly, 228 U. S. 702 (affirming on that point the decision of the Supreme Court of Arkansas, 98 Ark. 240); Toledo, St. L. & W. R. R. Co. v. Slavin, 236 U. S. 454.

Contracts of Exemption from Liability.—The act declares all stipulations or contracts whereby the carrier is to be exempt from any liability created by the act void, and it has been held that this provision is constitutional, and a stipulation, making the acceptance of benefits under a contract of membership in a relief department, a bar to an action, is void, whether the contract was entered into before or after the enactment of the act.[67]

Set-Off.—The act permits a "set-off of any sum contributed or paid by the carrier to any insurance, relief benefit or indemnity that may have been paid to the injured employe or the person entitled thereto on account of the injury or death for which the action is brought." I have been unable to find any reported case in which this clause has ever been construed. Does the set-off include the full amount paid to the injured employe, or in case of his death to the beneficiaries entitled to recover under the act, by the insurance, relief benefit, or indemnity company, or only the amount which the railroad has contributed to secure such payment? The language of the statute is not free from ambiguity, but, considering the act as a whole, it seems that only the amount contributed or paid by the carrier can be subject of the set-off, for that is all the carrier is out of pocket. If this view is correct, the question arises, is the set-off limited to the contributions made by the employer to the payment of the premiums for the year in which the injury occurred, or all payments made during the entire period of the injured employe's service? The company may have carried and paid for an accident policy on the employe injured for twenty-five years without any liability having been incurred during that time, prior to that sued for. Can all these payments be set-off, or only the premium paid for the year the injury occurred? I think only the amount contributed that year can be set-off.

(67) Philadelphia, etc., R. R. Co. v. Schubert, 224 U. S. 603.

It seems strange that these questions have never been raised, although the act has now been in force for over seven years.

Limitation.—The act prescribes that an action under its provisions must be brought within two years from the day the cause of action accrued. In my opinion, a state statute which extends the general statute of limitations for a certain period in cases of a nonsuit, voluntary or involuntary, will not apply to an action under this act. As the liability has been created by legislation, which liability did not exist under the common law or any act of Congress enacted theretofore, the time mentioned in the act within which the suit must be instituted, is a condition of the liability, and not a statute of limitation. This has never been passed on by any court so far as it relates to the Employers' Liability Act, but the rule stated has been uniformly applied to actions under the Lord Campbell Acts.[68] As stated in Phillips Co. v. Grand Trunk, etc., Ry. Co.,[69] * * * "Under such a statute the lapse of time not only bars the remedy but extinguishes the liability." There is no reason why these authorities should not govern proceedings under this act.

In addition to these reasons, I may add another equally conclusive. Congress, in its wisdom, has seen proper to create a statute of limitations for actions under this act instead of permitting them to be governed by the statute of limitations of the state where the action is brought, and has made no exceptions. That Congress possesses this power is beyond question.[70] For this reason, the well recognized rule that, when the Legislature makes no exceptions in a statute of limitations, the courts can make none, whatever be the hardship in individual cases, applies.

By Whom Must the Action Be Brought.—The act requires all actions to be brought

(68) The Harrisburg, 119 U. S. 199; Partee v. St. L. & S. F. Ry. Co., 204 Fed. 970, 123 C. C. A. 292; Earnest v. St. Louis, etc., R. R. Co., 87 Ark. 65; Anthony v. Railway Co., 108 Ark. 219.

(69) 237 U. S.

(70) Mitchell v. Clark, 110 U. S. 633.

by the personal representative, and it has been conclusively determined that an action in the name of the beneficiaries, even if there be no personal representative, and the statutes of the state permit the action to be brought in the name of the beneficiaries, cannot be maintained under this act.[71]

Apportionment of Damages.—When the action is brought by the personal representative for the benefit of several beneficiaries, it was held in Gulf, Colorado, etc., Ry. Co. v. McGinnis, that as the action of the administrator is not for the equal benefit of each of the surviving relatives, the interest of each beneficiary must be measured by his or her individual pecuniary loss, and apportioned accordingly. That apportionment must be made by the jury, and a judgment for the plaintiff for a gross sum, without apportionment by the jury among each of the beneficiaries, cannot be sustained. In Kansas City Southern Ry. Co. v. Leslie,[72] a different conclusion was reached, the court evidently having overlooked the McGinnis case. That case is now on error in the Supreme Court of the United States.

Are Alien Beneficiaries Within the Provisions of the Act?—In Pennsylvania it had been held by the highest court of the state that the Lord Campbell Act of that state did not apply to relatives of the deceased who were non-resident aliens, and they could not recover under it.

This construction of the Pennsylvania statute by its highest court was held binding on the national courts in an action under the state statute.[73] But in McGovern v. Philadelphia & Reading Ry. Co.,[74] it was held, reversing the district court,[75] that this construction does not apply to the Federal Employers' Liability Act, which is exclusive of state statutes and broad enough to permit such an action to be maintained by the personal representative of the decedent for the benefit of non-resident alien beneficiaries.

Changes of the Common Law by the Act.—The act makes many changes in the common law rules which heretofore prevailed in most of the states of the union. It abolishes the fellow-servants rule, the common law rule of contributory negligence, and in place of the latter establishes that of "comparative negligence;" provides for a survival of the action; abolishes assumption of risk in certain cases, and declares all contracts, rules, regulations or devices whatsoever, the purpose of which shall be to enable a railroad company to exempt itself from any liability created by the act, absolutely void. While this last provision curtails the freedom of contract to a considerable extent, it is based upon the fact now generally recognized, that an employe of a powerful corporation or employer does not stand upon an equality with them, and in most cases must submit to their demands, no matter how exacting or be without employment, and thus be deprived of the means of livelihood for himself and the family dependent upon his earnings. As has been stated by an eminent English judge, "His poverty, not his will, consented to the terms demanded."

The supposed mobility of labor, that an employe is free to accept, remain in, or abandon an employment, is correct in theory, but in practice it is a myth. The choice frequently lies between employment on the terms dictated by the employer, and starvation, and only by force of law can these conditions be changed.

To curtail the freedom of contract for the protection of life and limb is a prerogative every government must necessarily possess, or fail in its duty to protect the weak and helpless from the exactions of the strong and powerful. That is an exer-

(71) American R. R. Co. v. Birch, 224 U. S. 547; reaffirmed in American R. R. Co. v. Didrickson, 227 U. S. 145; Gulf, Colorado & Santa Fe R. R. Co. v. McGinnis, 228 U. S. 173; St. Louis, S. F. & T. Ry. Co. v. Seale, 229 U. S. 156; Taylor v. Taylor, 232 U. S. 363, and the complaint must allege the pecuniary loss sustained by each of the beneficiaries. Garrett v. Louisville & Nashville R. R., 235 U. S. 308.

(72) 112 Ark. 305.

(73) Maiorano v. Baltimore & Ohio Ry. Co., 213 U. S. 268.

(74) 235 U. S. 389.

(75) 209 Fed. 975.

cise of what is commonly known as "the police power." Such legislation is now generally conceded to be within the police power of every government, although at one time seriously questioned by eminent American judges.

Has Congress Exercised All Its Powers by These Acts?—Whether Congress in legislating on this subject has gone to the verge of its power under the commerce clause may well be doubted. A subject which has been much discussed is, whether Congress has the power to subject to its control all railroads engaged in interstate commerce, regardless of whether they are engaged in interstate or intrastate traffic at the time of the injury, if at times engaged in interstate commerce, and therefore, under the rules of law hereinbefore stated, an interstate carrier?

This would practically include every railroad in the country, as in the nature of things, there can be only an exceptional case of a railroad which does not, at some time or other, carry to or receive freight from another state, which is all that is necessary to make it a railway engaged in interstate commerce.

The majority opinion in the first Employers' Liability case apparently held otherwise. Of the justices then on the bench only four remain, and they were equally divided in their opinion in that case. Since then it has been held by that court[76] that Congress has the power to require safety appliances on all cars moving over "a highway of interstate commerce," although the vehicles, not thus supplied, are not used in such commerce. This was reaffirmed in Illinois Central Ry. Co. v. Behrens,[77] and Houston & Texas Ry. Co. v. United States,[78] where the first Employers' Liability case is distinguished on that question, but not overruled, nor, in fact, adversely criticised. The opinions in these last cases were delivered, the Houston & Texas Railway case by Mr. Justice Hughes, and the others by Mr. Justice Van Devanter, who also delivered the opinion of the court in the second Employers' Liability cases, neither of whom was on the Supreme Court bench when the first employers' liability case was decided.

Effect of These Acts.—That the legislation of Congress under the commerce clause has been of vast benefit to the nation, and has greatly assisted in the development of the country, and the facilitation of intercourse between the states, is conceded by all, and but for the broad and comprehensive language used in the constitution it may well be doubted whether the new conditions created by the rapid advance of the age could have been successfully met, or even the union, extending as it does now from the Atlantic to the Pacific, maintained.

We can well endorse what has been said by an eminent jurist that "the framers of the constitution saw, with prophetic eyes, the future vast growth and development of the union, and made the instrument with that view in sight."

Steam and electricity for transportation were then unknown, and by the most visionary not dreamed of; the vast commerce, not only among the states, but with every country on the known globe, now carried on by the people of this union could, at that time, hardly have been foreseen by the most optimistic dreamer. Still, the flexibility of the constitution, as construed by the Supreme Court under the precedents established when presided over by Chief Justice Marshall that "the constitution was intended to endure for ages to come, and consequently to be adapted to the various crises in human affairs," has enabled the nation to meet all twentieth century conditions under an instrument framed in the eighteenth.[79]

JACOB TRIEBER.

Little Rock, Ark.

(76) Southern Railway Co. v. United States, 222 U. S. 725.

(77) 233 U. S. 743.

(78) 234 U. S. 342.

(79) Mr. Philip J. Doherty's work on "The Liability of Railroads to Interstate Employes," has been of material assistance to me in the preparation of this paper.

GARNISHMENT—JUDGMENTS SUBJECT OF.

PRIBOTH v. CHISM, et al.

Supreme Court of Oklahoma. Jan. 30, 1917.

162 Pac. 1103.

(Syllabus by the Court.)

Garnishment proceedings against a judgment debtor will lie in favor of a creditor holding a judgment against the judgment creditor of such debtor; each judgment being recovered in the same court.

BURFORD, C. E. C. Priboth sued B. W. Chism for the recovery of certain rents and caused an attachment to issue. Chism thereupon gave a bond with his co-defendants as sureties to dissolve the attachment. The bond was conditioned to perform the judgment of the court. Priboth recovered judgment for the sum of $443.88 and $54.55 costs. Thereafter he commenced the present action on the bond. Defendants answered, setting up, in effect, payment. From their pleading and proof it appears that one Oma A. Haverson had recovered a large judgment in the district court of Tillman County against one A. F. Priboth, brother of plaintiff herein. After judgment she caused a garnishment to issue to Chism and Beard, alleging that they were indebted to A. F. Priboth, in that the moneys due from them to E. C. Priboth were in truth and in fact due to A. F. Priboth. The purport of all the allegations was that E. C. Priboth held the cause of action and subsequent judgment in his suit against Chism as a fraudulent trustee for his brother, A. F. Priboth, and in order to avoid the payment of the Haverson judgment. Meanwhile it seems that Chism had deposited $417.35 in money with Beard for the purpose of paying the judgment recovered by E. C. Priboth against Chism. Beard and Chism answered to the garnishment summons that they were nominally indebted to E. C. Priboth in the sum of $417.35, resulting from the rents involved in the suit of Priboth v. Chism, but believed that E. C. Priboth owed such amounts to A. F. Priboth. E. C. Priboth then intervened in the garnishment proceedings and claimed that Chism's debt was due him, and that he was not trustee for his brother. The whole matter was tried to the court, and judgment rendered against E. C. Priboth on his interplea and in favor of Haverson sustaining the garnishment and ordering garnishee to pay over to Haverson the money in their hands. This judgment became final.

Upon the record evidencing the above facts being introduced in the instant case, and the testimony closed, the trial court rendered judgment in favor of the defendants, from which judgment plaintiff, E. C. Priboth, brings the cause here for review.

The sole question is whether the defendant's pleading and proof constitute a defense. When Chism and his co-defendants executed the bond here sued upon to discharge the garnishment, the appearance of the defendant was entered and the action converted from one in rem to an action in personam. Bishop-Babcock-Becker Co. v. Hyde, 161 Pac. 172, 1 Appellate Court Bulletin, 549. The court no longer had any jurisdiction by virtue of the order of attachment over the property attached, and in the absence of fraud, mistake or the like grounds, upon the rendition of judgment against Chism, his liability and that of his sureties upon the bond became fixed and absolute. But this liability of the bondsmen could necessarily be discharged by payment, and that payment might be to E. C. Priboth direct, or, if authorized by process of law, payment could be made to some creditor of E. C. Priboth.

We know of no reason under the weight of modern authority why a creditor of Priboth, holding a judgment recovered in the same court, as was the case at bar, could not garnish the funds due him from his debtor, Chism. Keith v. Harris, 9 Kan. 386; 20 Cyc. 1010, and cases cited. Such being the case, Oma Haverson might have issued a garnishment to E. C. Priboth as an alleged debtor of A. F. Priboth, her direct judgment debtor. If E. C. Priboth denied liability, she could have taken issue on his answer, and by establishing that he did owe A. F. Priboth have recovered a judgment against him for the amount due him to A. F. Priboth. Being then a direct judgment creditor of E. C. Priboth, she could have sued out a garnishment summons to Chism and Beard, debtors of E. C. Priboth, and compelled the application of the amount of their debt to E. C. Priboth to her judgment in garnishment against him, and thus finally to the payment of her judgment against A. F. Priboth. This being true, though the proceeding was somewhat irregular, when the court in the garnishment proceeding from Haverson to Chism and Beard procured jurisdiction of E. C. Priboth by reason of his voluntary intervention, we see no reason why, then having all the parties and the whole subject-matter before him, he was precluded from rendering a judgment settling the whole matter and the rights of all the parties. This he did, decreeing that E. C. Priboth owed A. F. Priboth, judgment debtor of Haverson, and that Chism and Beard should pay the

funds in their hands due to E. C. Priboth to Haverson, thus canceling a portion of their debt to E. C. Priboth, of his debt to A. F. Priboth, and of A. F. Priboth's debt to Haverson. Having done this in obedience to a final judgment of a court of competent jurisdiction, it operated as a discharge pro tanto of the liability of Chism and his sureties on the bond to E. C. Priboth. None of the questions decided in St. L. & S. F. v. Crews, 151 Pac. 879, are here raised, and consequently are not considered. But in discharging the defendants altogether the trial court was in error. The liability on the bond was concededly the judgment of $443.85, and the costs of the original suit of Priboth v. Chism in the sum of $54.55. The liability on the garnishment to Haverson was but $417.25. The difference should have been recovered by the plaintiff. It is urged that the court in the Haverson garnishment suit held that E. C. Priboth held all the rents of a certain farm for A. F. Priboth, and that the judgment of E. C. Priboth against Chism was for such rents. But it seems that Chism and Beard in the garnishment proceedings answered only that they had $417.35. No issue was taken on their answer in garnishment. They were ordered to pay over "the money now in their hands." It does not, therefore, appear that there was any liability to Haverson on the part of the garnishees in excess of $417.35, or that they paid over any greater sum.

In so far, therefore, as the trial court denied plaintiff's recovery for the difference between his judgment and costs and the amount paid or to be paid upon the Haverson garnishment, such judgment was erroneous, and should be reversed, and in all other respects affirmed.

PER CURIAM. Adopted in whole.

NOTE.—*Right to Attach Fund in Hands of Officer of Court After Order of Distribution.*—Decision in accord with the holding in the instant case, especially, where the proceeding is in the court rendering the judgment, seems so very much one way that it is not thought worth while to run down cases to the contrary, if indeed any may be found. But to us a related question appears to present more diversity of view.

It is familiar that property *in custodia legis* cannot be reached by attachment or any *mesne* process on judgment. Does, however, this custody continue as not affecting any judgment or order for its distribution?

As taking the view that an officer of court remains so as to custody of funds coming into his hands to the extent that what he holds is *in custodia legis* as against attachment or garnishment is Cowart v. Caldwell Co., 134 Ga. 544, 68 S. E. 500, 30 L. R. A. (N. S.) 720. In this case a trustee in bankruptcy was summoned as garnishee after an order by a referee had directed him to pay over net proceeds of a sale to defendant. It was said: "The garnishment recognizes the action of the court ordering the sale and the payment of the net proceeds as a valid order and is founded on it. Without that order there would have been no sale and consequently no proceeds to pay. The garnishment proceeding, therefore, is necessarily against the trustee in his representative capacity and is an effort to subject funds, which he holds in that capacity under the order of the referee or bankrupt court." The court thought that to subject the fund to garnishment would cause confusion and conflicts of jurisdiction, and might delay infinitely the final winding of the bankruptcy matter. It is not clear that this would or even might do this. There is nothing pertaining to the administration of the estate of which the bankrupt or any creditor of his could complain. If the proceeds were held up or paid over, the administration as to this collateral duty not or being observed, could go ahead. It involves no more than the disposition of funds belonging to a third party.

Rockland Sav. Bk. v. Alden, 103 Me. 230, 68 Atl. 863, 14 L. R. A. (N. S.) 1220, 13 Ann. Cas. 806, held that duly deposited funds held by a court of bankruptcy for distribution cannot be subject to attachment even after order for their distribution, but they are in the custody of the law until actually paid over. It was said: "It is clearly within the power of the court and its duty to see that its assignee pays over to the distributees the dividends awarded to them. The assignee failing to perform its duty, the court will punish him for contempt, order a suit upon his official bond or refuse to give him a final discharge. No other court can touch or bind the assets of the bankrupt or authorize any suit against the assignee who is the officer of the court." But what has been ordered to be distributed has ceased to be assets of the bankrupt. There is a vested right in the distributee. This vested right has been attached by another, who also gains a vested right. No question to be decided by the court of bankruptcy can arise. It would be as competent for the court to proceed against its officer in contempt in behalf of the attaching creditor as in favor of the distributee whose money has been attached. The court granting the attachment interferes in no way with the jurisdiction of the court of bankruptcy or with any control over its officer.

Upon the same sort of reasoning it was thus held in Akins v. Stradley, 51 Iowa 414, 1 N. W. 609; Gilbert v. Quimby, 17 Blatchf. 402, 1 Fed. 113; People, Ex rel. v. Brooks, 40 Mich. 333, 29 Am. Rep. 534; Com. v. Hide & Leather Ins. Co., 119 Mass. 155, and other cases.

Many courts, however, hold that officers of court are subject to garnishment for funds remaining in their hands after the rights of parties thereto have been adjudicated. They take the view that the officer, while amenable possibly to the court and under his bond to faithfully account, yet essentially he becomes the agent of the party entitled to funds adjudicated. Thus is the case of Boylan v. Hines, 62 W. Va. 486, 59 S. E. 503, 13 L. R. A. (N. S.) 757. It is said: "Does an officer hold money in his official capacity after he has been directed by the court, whose instrument he is, to pay the same to the party to whom it belongs? Is not his legal custody, and through him, the custody of the law, then at an end? After

such direction of the court and before his payment pursuant thereto, to whom is his liability? The custody then rightfully belongs to the owner. The officer thereafter holds the money for him, not for the law, because the law has done with it and fulfilled its administration." It is then quoted from Shinn on Attachment, § 506, as follows: "When the purpose of the legal custody has been accomplished and the only duty of the officer is to pay the money to the principal defendant in garnishment, the officer then may be held in garnishment. * * * Official duty ceases when the court directs the officer to pay over the fund." See also Wade on Attachment, § 424.

In Dunsmoor v. Furstenfeldt, 88 Cal. 522, 26 Pac. 518, 12 L. R. A. 508, 22 Am. St. Rep. 331, it was ruled that a receiver or master in chancery to whom money had been transferred for distribution in accordance with a decree of court held it prior to decree as an officer of court, but *ipso facto* the rendition of the decree, ending the judicial proceeding in the case and nothing but its execution remained, the custody of the law ceased and what he held was subject to garnishment.

This doctrine has been applied in many cases: Weaver v. Davis, 47 Ill. 235; Wilbur v. Flannery, 60 Vt. 581, 15 Atl. 203; Gaither v. Ballew, 49 N. C. 488, 69 Am. Dec. 763; Cockey v. Leister, 12 Md. 124, 71 Am. Dec. 588; Fearing v. Shafner, 62 Miss. 791; Willard v. Decatur, 59 N. H. 137.

It would seem, that the law ought to take some account of time for the officer to go through the manual act of payment, but then there is the rule *lex subveniat vigilantibus non dorientibus.* And the act of passing receipts and the time consumed therein should not count, unless perhaps proof of performance of the court's order was to be evidenced in this way. A demand ought to be sufficient to change custody to the party entitled without actual transfer being accomplished.

As the rule forbidding garnishment is one to prevent conflicts of jurisdiction, this means, as we think, conflicts about matters of discretion and not about ministerial duties. The view that officers under the circumstances stated are subject to garnisthment seems to us better founded. C.

ITEMS OF PROFESSIONAL INTEREST.

RECENT DECISIONS BY THE NEW YORK COUNTY LAWYERS ASSOCIATION COMMITTEE ON PROFESSIONAL ETHICS.

QUESTION NO. 127.

False Statements; Relation to Court—False statement to jury concerning legally irrelevant fact, in order to counteract injurious impression created by adversary's examination of talesmen to ascertain their fitness as jurymen; condemned.—In the trial of an action to recover damges for personal injuries resulting from the alleged negligence of the defendant (it happens that he is insured by a casualty company) he is represented by the attorney for the casualty company. The plaintiff's counsel in empanelling the jury asks the usual questions as to whether any of the panel is a stockholder or an employe or officer of a casualty insurance company. When the defendant's counsel begins his examination of the jury he states that while the plaintiff's counsel has the legal right to make such an inquiry to ascertain whether the financial investments of any of the jurymen may create a mental bias or prejudice against the particular class of litigation, these questions have no materiality in the present trial because the defendant is not insured by any casualty company and any judgment recovered against him will have to be paid by him personally.

As stated before, the facts are otherwise. The defendant is insured by a casualty company, and any judgment of $5,000 or less will have to be paid by the casualty company.

Is the misstatement of the fact to the jury, in the opinion of the committee, reprehensible; or is it justifiable upon the theory that the questions of the plaintiff's counsel might have created in the minds of the jury the assumption that the defendant was insured, thereby forming a prejudice against him?

ANSWER NO. 127.

In the opinion of the committee, the conduct of the defendant's counsel was obviously improper. The supposed unfairness to the defendant of the questions of the plaintiff's attorney in empanelling the jury is, in the opinion of the committee, no justification for the false statement of the defendant's counsel, and this notwithstanding the fact that on the one hand in the state of New York, at least, § 1180 of the Code of Civil Procedure permits such questions to be addressed to the jurors as a good ground for a challenge to the favor, while under the decisions of its Court of Appeals, questions to witnesses designed to show the interest of a casualty company as an insurer in such actions are inadmissible. (See Cosselmon v. Dunfee, 172 N. Y. 507; Loughlin v. Brassil, 187 N. Y. 128; Simpson v. Foundation Co., 201 N. Y. 479.)

QUESTION NO. 128.

Annulment of Marriage; Employment—Acceptance of employment in behalf of infant wife to secure decree, upon recommendation of attorney for husband; if safeguarded, not disapproved.—An infant bride, whose marriage was consented to by her parents, refuses to consummate such marriage either sexually or

socially; and upon reaching the age of consent promptly disaffirms the marriage and seeks through her guardian to annul the same, under § 1743, subd. 1 of the Code of Civil Procedure.

The husband, hopeless of reconciliation, has no objection to such proceeding. The wife, however, has no funds with which to retain counsel; but the husband is willing to advance the same to her guardian for such purpose, and consults his own attorney, who in good faith suggests the name of another attorney for the wife to consult.

Query: Is it professionally improper for the attorney consulted by the wife to accept retainer and fee, knowing these circumstances, but without knowing, or having any dealings with, the husband?

ANSWER NO. 128.

The selection of the attorney, whether suggested by the husband or not, is controlled by the guardian by whom the action is brought—the minor having reached the age of consent but not of majority. With this safeguard, and if the facts be fully disclosed to the court, it is, in the opinion of the committee, not improper for such attorney, if consulted with a view to his being retained, to accept the employment, under a compensation advanced through the guardian by the husband.

BAR ASSOCIATION MEETINGS FOR 1917—WHEN AND WHERE TO BE HELD.

AMERICAN—Saratoga Springs, N. Y., September 4, 5 and 6.

ALABAMA—Birmingham, July 12, 13 and 14.

ARKANSAS—Hot Springs, May 23, 24 and 25.

GEORGIA—Tybee Island, May 31, June 1 and 2.

IDAHO—Seattle, Wash., July 26, 27 and 28.

ILLINOIS—Danville, May 31, June 1 and 2.

INDIANA—Indianapolis, July 11 and 12.

IOWA—Council Bluffs, June 26 and 27.

KENTUCKY—Louisville, July 6 and 7.

LOUISIANA—Alexandria, May 11 and 12.

MARYLAND—Atlantic City, N. J., the Marlborough-Blenheim, June 21, 22 and 23.

MICHIGAN—Grand Rapids, June 29 and 30.

MISSISSIPPI—Greenville, May 2.

NEW JERSEY—Atlantic City, Hotel Chelsea, June 15 and 16.

OHIO—Cedar Point, July 10, 11 and 12.

OREGON—Seattle, Wash., July 26, 27 and 28.

PENNSYLVANIA—Bedford Springs, June 26, 27 and 28.

TEXAS—Houston, July 3, 4 and 5.

WASHINGTON—Seattle, July 26, 27 and 28.

WISCONSIN—Madison, June 27, 28 and 29.

HUMOR OF THE LAW.

A Pennsylvania farmer was the owner of a good Alderney cow. A stranger, having admired the animal, asked the farmer: "What will you take for your cow?"

The farmer scratched his head for a moment and then said "Look-a-here, be you the tax assessor or has she been killed by the railroad?"—San Francisco Argonaut.

A detective was praising the truthfulness of women.

"If war bulletins were as truthful as women," he said, "we'd have a better idea of how this world-strugle is really going.

"I remember a case the other day—it's interesting in its revelation of woman's truthfulness—the case of a husband who had disappeared.

"Questioning the wife, I said to her:

"'And now, madame, tell me—this is very important—tell me what your husband's very last words were when he left?'"

"'His last words,' the truthful creature answered with a blush, 'were, "For heaven's sake, shut up."'"

Prof. Roscoe Pound tells this one:

"I once had to prosecute a colored congregation, whose devotions, protracted until two or three o'clock in the morning, became so vociferous and involved so many personal encounters after midnight as to require a prosecution for disorderly conduct. The principal witness for the accused, who testified that all of the proceedings were strictly of a religious character and were orderly in every way, was the colored clergyman. When it came time to cross-examine him, as I had been advised by those back of the prosecution that he was a bogus clergyman, the first question I asked was: 'When and where were you ordained?' He delivered an eloquent speech for some fifteen minutes about his work as 'one ob de Lord's poor servants,' but said nothing upon the question. I repeated the question, 'When and where were you ordained?' He spoke again at great length about the trials and tribulations of his career in the ministry, but did not answer the question. I asked the question for the third time, and after the court had admonished him that he must answer it, he replied: 'Well, Mr. Pound, de fact am, I'se been exhortin' nigh on to twelve years. But I'se nebber been a regular licentious preacher.'"

WEEKLY DIGEST

Weekly Digest of ALL the Important Opinions of ALL the State and Territorial Courts of Last Resort and of ALL the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co. St. Paul, Minn.

1. **Adoption**—Executory Contract.—A valid, but unperformed contract to adopt gives the child no right, on the death of the promisor's own son to whom the promisor conveyed land, leaving neither issue nor parent, to maintain ejectment, though the child would have inherited it if adoption had taken place.—Malaney v. Cameron, Kan., 161 Pac. 1180.

2. **Adverse Possession**—Public Use.—While title to property held by a municipality for public use cannot be acquired by adverse possession, the rule is otherwise as to property not held for public use.—Robinson v. Lemp, Idaho, 161 Pac. 1024.

3. **Attachment**—Discharge. — That property attached is not the property of defendant is not ground for discharge of attachment on defendant's motion.—First Nat. Bank v. Coates, Okla., 161 Pac. 1095.

4. **Attorney and Client**—Disbarment.—Under Judiciary Law, § 477, providing that any attorney convicted of a felony shall cease to be an attorney or to be competent to practice law, an attorney convicted in another state of larceny after a trust will be disbarred.—In re Innes, N. Y., 162 N. Y. Supp. 721.

5.——Disbarment.—Where an attorney permits a witness procured by him and regarded as highly important to give false testimony, of the falsity of which he knows, and adopts such testimony in summing up, he is guilty of professional misconduct warranting disbarment.—In re Palmieri, N. Y., 162 N. Y. 799.

6.——Equitable Lien.—Where the constitution and statutes provide the method for payment of claims against the state, an attorney recovering a judgment for benefit of state has no equitable lien on the recovery.—State v. National Surety Co., Idaho, 161 Pac. 1026.

7.——Presumption.—In absence of evidence of fraud or want of authority, authority of an attorney is presumed.—Strand Imp. Co. v. City of Long Beach, Cal., 161 Pac. 975.

8.——Substituting Attorney.—The only person entitled to notice of motion for substitution of attorneys is the attorney first employed, who may set aside a substitution obtained without sufficient notice to him.—Gill v. Southern Pac. Co., Cal., 161 Pac. 1153.

9. **Bankruptcy**—Attorneys.—Selection of one as trustee cannot be set aside, because his attorneys represented a creditor whom it was claimed asserted rights to property of bankrupt adverse to other creditors; the attorneys agreeing in case of conflict not to represent the creditor, and the trustee agreeing in such case to engage additional attorneys.—In re Archbold & Hamilton, U. S. D. C., 237 Fed. 408.

10.——Competitive Bidding.—Where, after a sale of the equity of redemption of a bankrupt corporation in property sold under mortgage foreclosure, confirmation was denied, and resale was ordered to allow stockholders' committees to buy in the property, held, that competitive bidding should be provided.—In re Ohio Copper Mining Co., U. S. D. C., 237 Fed. 490.

11.——Consignment.—Goods to be paid for when sold by consignee were held on consignment, and could be recovered from the estate of consignee in bankruptcy.—In re Wright & Barron Drug Co., U. S. D. C., 237 Fed. 411.

12.——Equity of Redemption.—Where an order of referee for resale of equity of redemption of bankrupt corporation in property sold under mortgage foreclosure provided for payment of all debts in case of purchase by stockholders' committees, inclusion of provision releasing stockholders from liability is immaterial.—In re Ohio Copper Mining Co., U. S. D. C., 237 Fed. 490.

13.——Foreclosure.—That an order of the referee for resale of a bankrupt corporation's equity of redemption in property sold under mortgage foreclosure contained directions to the purchaser in the foreclosure beyond the power of the court affords no ground for vacation, the purchaser not objecting.—In re Ohio Copper Minrig Co., U. S. D. C., 237 Fed. 490.

14.——Remainderman.—The interest of a remainderman, under a devise of a life estate to a widow with unlimited power of disposal, with remainder over, passes to his trustee in bankruptcy.—In re Dorgan's Estate, U. S. D. C., 237 Fed. 507.

15. **Banks and Banking**—Liquidation.—Under the state banking law (Laws 1914, c. 124), a depositor has a claim on a bank's insolvency

for the amount of his deposits, undiminished by a check for sight exchange, on which sight exchange payment was refused because of liquidation proceedings of the bank, in the absence of proof that the sight exchange was accepted as payment of the check.—Anderson v. Owen, Miss., 73 So. 286.

16. **Bills and Notes**—Holder in Due Course.—Where an agent sold shares of stock without complying with Acts 1913, p. 117, taking a note therefor, an innocent purchaser for value before maturity may, though the sale was voidable under § 8 of the act, collect the note.—J. Furman Evans Co. v. Bryson, Ga., 91 S. E. 71.

17.——Notice of Defects.—It is not necessary to constitute one a purchaser with notice of defects that he should have known of the exact fraud committed in securing the mortgage if he did in fact know of a defect therein.—Paika v. Perry, Mass., 114 N. E. 830.

18.——Renewal.—Where joint principals on a joint note gave a renewal note in lieu thereof, without any additional consideration, they were joint principals on the renewal note in the absence of any agreement, that one should be principal and the other surety.—Doby v. Almand & George, Ga., 91 S. E. 21.

19.——Usury.—A note which is usurious is as to such usury a nullity, and though negotiable in form, is not currency in the market, and no innocence or ignorance on the part of the holder can render it valid.—Eskridge v. Thomas, W. Va., 91 S. E. 7.

20. **Brokers**—Commissions.—A broker cannot recover commissions for sale of realty under a contract making passage of title a condition precedent, where the purchaser refuses to complete the sale because of imperfect title.—Schwartz v. Handler, N. J., 99 Atl. 437.

21.——Good Faith.—Where broker sells land of his principal at price in excess of that agreed on, and fraudulently appropriates the difference or permits others to do so, he becomes liable for the value of the commissions received.—Craig v. Parsons, N. M., 161 Pac. 1117.

22. **Carriers of Goods**—Valuation.—Where plaintiff concealed true value of express packages and paid a lower rate upon an agreed valuation, the company's rates being filed as required by Interstate Commerce Act Feb. 4, 1887, as amended, plaintiff could not recover true value from express company, where goods were stolen by its agent.—D'Utassy v. Barrett, N. Y., 114 N. E. 786.

23. **Carriers of Live Stock**—Waiver.—Where notice of injuries received by a caretaker accompanying an interstate shipment of live stock was a condition precedent to recovery, such notice cannot be waived by the carrier, for to do so would work a discrimination.—Missouri, K. & T. Ry. Co. v. Lynn, Okla., 161 Pac. 1058.

24. **Carriers of Passengers** — Ejection. — Where a passenger while asleep is carried beyond his station, and when awakened expresses an intention to continue his journey, offering to pay fare, but is ejected, that he failed to tender fare is no defense to action for damages.—Southern Ry. Co. v. Williams, Ga., 91 S. E. 46.

25. **Chattel Mortgages**—Assignment.—Assignment of a mortgage on mules signed by the "A. C. S. Company," the mortgagee, by "J. W. C.," without evidence to show whether the mortgagee was a corporation or a partnership, and without proof of authority of J. W. C. to assign the mortgage, is insufficient to support detinue by the assignee to recover the mules.—Columbus Grocery Co. v. Prince, Ala., 73 So. 333.

26.——Waiver.—An unconditional license to sell mortgaged property operates, when acted upon, as a waiver of the security, whether such license is oral or written, express or implied.—Rogers v. Whitney, Vt., 99 Atl. 419.

27. **Commerce**—Employe.—Gateman employed by railroad operating interstate, and intrastate trains, at point used daily by many trains, whose employment was considered in making up main schedules, killed by intrastate train while backing horse away from tracks, was "engaged in interstate commerce."—Southern Pac. Co. v. Industrial Accident Com. of State of California, Cal., 161 Pac. 1139.

28.——Jurisdiction.—Railroad crossing flagman on branch line used for interstate and intrastate commerce, killed while flagging a train, held "engaged in interstate commerce," so that state industrial accident commission had no jurisdiction to make an award.—Southern Pac. Co. v. Industrial Accident Commission of State of California, Cal., 161 Pac. 1142.

29.——Police Power.—The security of the lives and homes of the people is more important than interstate commerce, and the latter must yield to the former under the reserve police power of the state.—Kaw Valley Drainage Dist. of Wyandotte County v. Missouri Pac. Ry. Co., Kan., 161 Pac. 937.

30.——Rates.—The Interstate Commerce Commission cannot properly deny a railroad company the right to change from an unreasonably low rate to a just and reasonable rate solely because of the injury which may result to shippers from the change.—McLean Lumber Co. v. United States, U. S. D. C., 237 Fed. 460.

31. **Constitutional Law**—Physicians and Surgeons.—Act No. 56 of 1914, excepting certain classes from requirements of practitioners of medicine, does not contravene Const. art. 48, prohibiting grant of any special or exclusive right, privilege, or immunity.—Louisiana State Board of Medical Examiners v. Charpentier, La., 73 So. 248.

32. **Contempt**—Inherent Power.—The supreme court has inherent power to punish as for a direct contempt any person who during the pendency of an action publishes an article referring to the same, reflecting on the efficiency and integrity of the court.—In re Hayes, Fla., 73 So. 362.

33. **Corporations** — Consolidation. — Where stockholders in two breweries for purpose of consolidation organized a third corporation and agreed to accept shares of stock in exchange for their own, but two who promoted the new corporation secured a greater number of shares and retained the excess, their action was a legal fraud upon the new corporation.—Lyons v. Webster, Ala., 73 So. 337.

34.——Deed.—Where directors of company authorized its president and treasurer to sell its buildings, machinery, and real estate, and president and treasurer agreed with plaintiff to sell such property, held, that plaintiff did not take title to molds used by company, though his deed purported to convey equipment of plant.—Vreeland v. Irving, Conn., 99 Atl. 574.

35.——Fraud.—Where party was induced by fraud to purchase corporate stock, and later purchased bonds of company, he was not under obligation to return or offer to return bonds as condition precedent to bringing bill against seller of stock for rescission of contract for its purchase. Lufkin v. Cutting, Mass., 114 N. E. 822.

36.——Insolvency.—Under an act authorizing appointment of a receiver for a corporation on ground of insolvency, held, that insolvency may consist of a deficiency of assets over liabilities, or inability to meet financial obligations as they mature in usual course, or both.—Whitmer v. William Whitmer & Sons, Del., 99 Atl. 428.

37.——Intervention.—Stockholders of a corporation cannot intervene in a proceeding to foreclose a mortgage on corporate property, setting up defenses which were available to the corporation, where there was no averment of any demand upon or refusal by the corporation to assert such defense.—Rospogliosi v. New Orleans, M. & C. R. Co., U. S. C. C. A., 237 Fed. 341.

38.——Quo Warranto.—Though directors of corporation were all nonresidents in violation of Act Jan. 7, 1867 (P. L. 1368), question of their eligibility to office can be raised only by quo warranto, and not in proceeding to enjoin condemnation pursuant to resolution of directorate relocating right of way.—Williams v. Delaware, L. & W. R. Co., Pa., 99 Atl. 477.

39. **Covenants**—Contractural Obligation.—The sale of lots by a townsite company, with statement that railway would build its depot opposite the lots, held not a contractural obligation in the nature of a covenant to erect the depot.—Ore City Co. v. Rogers, Tex., 190 S. W. 226.

40. **Damages**—Difficulty in Ascertaining. — Where corporation breached its contract with city for reduction of latter's garbage, that determination of damages suffered by city would be difficult does not preclude recovery of damages resulting from such breach nor make claim contingent rather than accrued.—City of Bridgeport v. Aetna Indemnity Co., Conn., 99 Atl. 566.

41.——Emergency.—A woman who on discovering that she was about to be run down by an engine approaching a crossing in a grossly negligent manner, leaps from the track and falls, is entitled to recover for resulting injury.—Southern Ry. Co. v. Jackson, Ga., 91 S. E. 28.

42. **Dedication**—Acceptance.—If a highway is established by dedication and acceptance by the public, it continues to be a highway as long as public use continues, regardless of attempted revocation by the dedicator.—Morris v. Blunt, Utah, 161 Pac. 1127.

43.——Platted Land.—A conveyance to a town of an avenue as delineated on the recorded plat "as and for a public street," and the town's acceptance thereof, constituted the avenue a public town-way over which the town had authority.—Farnsworth v. Macreadie, Me., 99 Atl. 455.

44. **Divorce**—Lien.—Where a wife sues for divorce and alimony and specifically describes certain real estate, and seeks to prevent its alienation, asking that it be subjected to her claim for alimony, and she is granted judgment awarding her property, her claim is superior to lien of attaching creditor perfected after wife's suit.—Germania Nat. Bank v. Duncan, Okla., 161 Pac. 1077.

45. **Easements**—Prescription.—A prescriptive easement does not arise in seven years by analogy to the statute barring action to recover realty when a plaintiff was not seised of the property within seven years, such statutes not applying to right of way or easements, but prescriptive right can arise only by adverse use and enjoyment under claim of right uninterrupted and continuous for 20 years.—Morris v. Blunt, Utah, 161 Pac. 1127.

46. **Electricity**—Discrimination.—Act of electric lighting company in giving special rate to concerns using specified quantity of current held not reduction in general rates within contract with another customer entitling it to reduction.—Steele-Smith Dry Goods Co. v. Birmingham Ry., Light & Power Co., Ala., 73 So. 215.

47. **Executors and Administrators**—Accounting.—That in executor's final account an item of money paid to a creditor of the estate is less than the account of the creditor's claim cannot be urged by the creditor as an objection to the account; the creditor's remedy being by suit for the amount of his claim.—In re Swan, Me., 99 Atl. 449.

48. **Exemptions** — Insurance. — Under Code 1907, § 4502, as to amount of exemptions of life insurance, policies of deceased husband in excess of $30,000 held subject to the payment of his debts.—Kimball v. Cunningham Hardware Co., Ala., 73 So. 323.

49. **Fixtures**—Mortgage.—Dynamos used for operating a light plant, attached to the timbers in the power house of a water mill and operated by the same power, both plants being the property of the same owner, held not to pass under a mortgage of the mill property as fixtures.—Williamson v. City of Clay Center, U. S. C. C. A., 237 Fed. 329.

50. **Frauds**—Misrepresentation. — Owner of premises in New York City who misrepresented their value and that he had arranged for second mortgage of $7,000 thereon, whereby plaintiff could obtain the amount in cash if she exchanged her Hartford property for his, held liable to plaintiff in action of deceit for fraudulent representations, though plaintiff managed to meet her obligations without assistance.—Bitondi v. Sheketoff, Conn., 99 Atl. 505.

51. **Frauds, Statute of**—Guaranty.—Where guaranty written on back of mortgage given to secure title retention contracts guaranteeing "the payment of the within note and mortgage" was executed before delivery of the note and mortgage, the words, "value received," in the mortgage note were sufficient to take guaranty

out of statute of frauds.—Dillworth v. Holmes Furniture & Vehicle Co., Ala., 73 So. 288.

52. **Gas**—Rates.—A gas company should not be required to give enlarged service at a considerable cost where the prospects of return for many years are so meager as to be out of proportion to the cost, but cannot withhold desired service until it promises immediate adequate return.—New Britain Gaslight Co. v. Root, Conn., 99 Atl. 559.

53. **Guaranty**—Damages. — In action upon guaranty of contract for purchase of standing timber to be cut and removed, the measure of damages was not the difference between the market value of the timber at the breach and the contract price, but was the price of the timber as fixed by the contract.—Baskett Lumber & Mfg. Co. v. Gravlee, Ala., 73 So. 291.

54. **Habeas Corpus**—Municipal Judge.—Where vagrant was sentenced by a municipal judge to fine and imprisonment, without any evidence introduced, and before the time for appeal had elapsed was taken to a road gang and compelled to work on the public highway, he will be discharged.—Ex parte Burleson, Okla., 161 Pac. 1101.

55. **Highways**—Negligence.—That plaintiff's husband, who fell from highway embankment to railroad tracks below, receiving fatal injuries, went upon highway while in intoxicated condition does not, as matter of law, show that he was guilty of contributory negligence in proceeding as he did.—Darnals v. Sylvania Tp., Pa., 99 Atl. 475.

56. **Husband and Wife**—Necessaries.—An attorney may recover from husband for services in divorce case instituted in good faith for wife, necessary to secure her legal protection, where facts would justify relief asked; suit being later dismissed by wife, upon the doctrine of husband's liability for wife's necessaries.—Maddy v. Prevulsky, Ia., 160 N. W. 762.

57.——Ratification.—Where a wife's cotton was taken in her absence and delivered by her husband without her consent to another, her mere silence after knowledge of the conversion did not amount to a ratification of the taking or waiver of the tort.—Kelly v. Cook, Ala., 73 So. 220.

58. **Injunction**—Amending Order.—In injunction against a driver who had sold a laundry route to plaintiff and worked for him thereon, restraining the driver on leaving plaintiff "from soliciting laundry work from" plaintiff's customers, it was proper to insert the words, "but not from receiving" before the words, "laundry work," etc.—New Method Laundry Co. v. Mac Cann, Calif., 161 Pac. 990.

59. **Innkeepers**—Fire Escapes.—Where an innkeeper failed to comply with Laws 1911, c. 56, § 1, concerning the establishment of fire escapes from the building and other devices, he is liable for damages for the death of a guest brought about by his negligence.—Hoopes v. Creighton, Neb., 160 N. W. 742.

60.——Ordinary Care.—At common law, where property is brought to hotel for sale or show, such as goods of commercial travelers, innkeeper is not held to strict liability, but only to ordinary care, and is answerable only for negligence.—Abercrombie v. Edwards, Okla., 161 Pac. 1084.

61. **Insurance**—Delivery of Policy.—Where insured was examined for insurance, he appeared in perfect health, but he was taken with appendicitis before policy was delivered, and note given for premium was not paid before death, held that, despite delivery by agent, policy did not take effect.—Williams v. Empire Life Ins. Co., Ga., 91 S. E. 44.

62.——Insurable Interest. — Mortgagees of house covered by policy of fire insurance whose interest, though not in fact indorsed on the policy, regarded by equity as having been so indorsed, had an insurable interest and a cause of action against insurer after loss.—Continental Ins. Co. v. Bair, Ind., 114 N. E. 763.

63.——Official Opinion.—Although opinion of auditor of state interpreting statute in relation to formation of insurance companies which he is charged to enforce, and opinion of attorney-general construing such statute, are not binding on courts, fact that such opinions were obtained is entitled to weight in determining bona fides of action based thereon.—Welliver v. Coate, Ind., 114 N. E. 775.

64.——Reformation of Contract.—Beneficiary of member of mutual aid association held not entitled to reformation of member's policy to change the date thereof to conform to that of his first application, which, without negligence on his part, was lost, so that his death would appear to have occurred more than 30 days after issuance of the policy.—Mississippi Benevolent Mut. Aid Ass'n v. Banks, Miss., 73 So. 283.

65.——Representations.—Where false statements of deceased in his application for life insurance in a fraternal association related to slight injuries which did not affect his general health, they will not avoid contract unless material to and increase risk of loss.—Witherow v. Mystic Toilers, Utah, 161 Pac. 1126.

66. **Intoxicating Liquors**—Forfeiture.—In a proceeding by the state to forfeit intoxicating liquors, where there was a failure to comply with Laws 1913, c. 6515, requiring an information to be filed within 24 hours after seizure, a decree ordering forfeiture and destruction of the liquors will be reversed.—Lippman v. State, Fla., 73 So. 357.

67.——Misdemeanor.—Where the offense of keeping liquors for sale in violation of the prohibition laws is a misdemeanor, all concerned in its commission are principals.—Crawley v. State, Ala., 73 So. 222.

68.——Regulation.—Laws 1909, p. 182, providing that a manufacturer of intoxicating liquors shall not own or have any interest in the stock or fixtures of any retail liquor store, held not to prohibit interest of brewer in real estate where liquor is sold, so that a mortgage of lot and building to a brewer was invalid.—Rashford v. Ridgefield State Bank, Wash., 161 Pac. 1196.

69. **Judges**—Disqualification.—Where an attorney for one of the parties was to be paid a certain sum in all events, and a greater sum if his client's claim was upheld, such fact does not disqualify a judge, who was a brother of the attorneys, from presiding.—Young v. Harris, Ga., 91 S. E. 37.

70. **Libel and Slander**—Damages.—Defendant having, without provocation, in presence of others, applied to plaintiff vile epithets, an award of $50 as damages will be increased to $250.—Mackay v. Pendergast, La., 73 So. 238.

71.——Oral Statement.—In an action for libel, testimony of a qualified witness as to the meaning of the expression used by defendant was admissible the same as it would have been with reference to an oral statement.—King v. Pillsbury, Me., 99 Atl. 513.

72.——Repetition.—Though defendant uttered and originally published alleged slander, if he is not responsible for its repetition and communication to plaintiff, he is not liable for damages thus occasioned.—Donaldson v. Roberson, Ala., 73 So. 223.

73.——Slander per se.—It is slanderous per se to say to customers of a salesman that he is a thief and ought to be sent to the penitentiary, and that he failed to turn in money of his employer.—Manion v. Jewel Tea Co., Minn., 160 N. W. 767.

74. **Mandamus** — Condition of Granting. — Where right sought to be enforced by mandamus is a mere private right of the relator, bond should be required before the issuance of the alternative writ.—State v. Smith, Conn., 99 Atl. 555.

75.——Inspection of Corporate Books.—Where, on petition for mandamus to inspect the books, etc., of a corporation, it appeared that complainant was suing the corporation, and respondents consented to inspection by complainant of all books and papers except correspondence relating to the litigation, a peremptory writ for examination so limited was proper.—Dintenfass v. Amber Star Films Corp., R. I., 99 Atl. 516.

76. **Master and Servant**—Hazardous Employment.—A street surface railroad is engaged in a hazardous business under the Workmen's Compensation Law. — McCabe v. Brooklyn Heights R. Co., N. Y., 162 N. Y. Supp. 741.

77.——Negligence.—That chickens furnished servant in a canning factory for cleaning and cutting had been kept in cold storage did not affect master's liability in respect to an infection through an existing scratch resulting from decayed carcasses.—Potter v. Richardson & Robbins Co., Del., 99 Atl. 540.

78.——Res Ipsa Loquitor.—Where a locomotive fireman was injured by derailment of an engine going 35 miles an hour around a curve, the doctrine of res ipsa loquitur applies.—Manning v. Chicago, Great Western R. Co., Minn., 160 N. W. 787.

79.——Workmen's Compensation Act.—Under Workmen's Compensation Act, § 14, held that, carpenter hired temporarily by a laundry company and killed while repairing house of a stockholder, was a casual employe and not employed in usual course of business of company, and his widow was not entitled to compensation under the act.—La Grande Laundry Co. v. Pillsbury, Cal., 161 Pac. 988.

80.——Workmen's Compensation Act.—If an employe wishes to retain a common-law right of action to recover damages for personal injuries, he must so notifx his employer in writing as expressly provided by Workmen's Compensation Act, pt. 1, § 5.—White v. George A. Fuller Co., Mass., 114 N. E. 829.

81. **Mortgages**—Attorney Fee.—Where mortgage provided for attorney's fee only for foreclosure under power of sale, chancellor erroneously allowed such fee for foreclosure by cross-bill, in suit to redeem land from foreclosure sale.—O'Neal v. Lovett, Ala., 73 So. 329.

82.——Failure of Consideration.—Where a mortgage and mortgage note were given for work in remodeling a building and no time was specified within which the work should be done, although the mortgage was negotiated before the work was done, the mortgagors could not attack the title for total failure of consideration. —Paika v. Perry, Mass., 114 N. E. 830.

83.——Notice.—In absence of notice, title of purchaser of real estate at sale under power in deed of trust, held not affected by defects in title of mortgagor's grantor consisting of lack of consideration and false representations.—Caruthers Bldg. Co. v. Johnson, Cal., 161 Pac. 985.

84. **Municipal Corporations**—License. — The fact that a motorcyclist had no license for his machine, does not preclude recovery of damages for injuries to himself and his machine through collision with defendant's automobile.—Marquis v. Messier, R. I., 99 Atl. 527.

85.——Negligence.—A city is not liable for injuries to child by dynamite caps used in blasting preparatory to installing water and sewer systems in city's detention hospital, which caps were negligently left by city employes.—Frost v. City of Topeka, Kan., 161 Pac. 936.

86.——Negligence.—The violation of a sanitary ordinance requiring property owners to maintain receptacles for refuse, and papers, etc., it not necessarily negligence per se as to travelers on highway, though it may as a matter of fact amount to negligence.—Bowen v. Smith-Hall Grocery Co., Ga., 91 S. E. 32.

87.——Ordinance.—One passing in front of a standing street car had a right to assume that no automobile would come from the rear of the car on the left-hand side of it, in violation of ordinance.—Harris v. Johnson, Cal., 161 Pac. 1155.

88. **Negligence** — Anticipation. — Where a woman was enceinte, held that her miscarriage might have been anticipated as a contingency likely to happen on the firing of the pistol in her immediate presence and in close proximity to her child.—Alabama Fuel & Iron Co. v. Baladoni, Ala., 73 So. 205.

89.——Res Ipsa Loquitur.—Where defendant's moving wagon ran into plaintiff's wagon standing, properly drawn up, beside curb, throwing plaintiff to ground and injuring him, held, that there was an inference of negligence on defendant's part under doctrine of res ipsa loquitur, if facts do not show direct negligence.—Wasserman v. Kaufman, N. Y., 162 N. Y. Supp. 752.

90 **Officers**—Discharge of Soldiers. — While under Const. art. 5, § 9, as to promotions in civil service, and Civil Service Law, § 21, giving a preference to honorably discharged soldiers and prohibiting their disqualification on account of age or physical disability which does not impair their competency, a veteran may be disqualified by failure to pass examinations, there is no act of the legislature prohibiting any citizen from entering a competitive examination in the civil service by reason of age.—Loud v. Ordway, N. Y., 114 N. E. 800.

91. **Physicians and Surgeons** — License. — Under Code 1907, § 7564, prohibiting practicing medicine without a license, any agency of supposed therapeutic value designed to cure, prevent or alleviate human diseases or suffering of body or mind used by one who receives a quid pro quo for such service, is within its terms.—Fealy v. City of Birmingham, Ala., 73 So. 296.

92. **Railroads**—Last Clear Chance.—One injured by railroad train at a highway crossing may recover, notwithstanding his preceding contributory negligence, providing he is using the highway for a proper purpose, and the operators of the train could have discovered his peril in time to prevent the accident.—Dickson v. Chattanooga Ry. & Light Co., U. S. C. C. A., 237 Fed. 352.

93.——Speed of Trains.—The rule, that the highest speed consistent with safety of passengers is permissible, is subject to exception where train enters city or town where people congregate or pass to and fro in numbers.—Foreman v. Louisiana Western Ry. Co., La., 73 So. 242.

94. **Sales**—Conditional Sale.—Under a contract containing the ordinary provisions of both a conditional sale and a chattel mortgage, the seller must elect his remedy, and where he has retaken possession he cannot thereafter sell under the mortgage and recover the balance of the purchase price.—Rice v. Hampton, S. C., 91 S. E. 5.

95.——Retention of Title.—Seller of furniture under title retention contract, who, after buyer's default, took a note and mortgage on the property, guaranteed by defendant and expressly agreeing that after maturity he might seize and sell property, might after seizure and sale leaving a balance seek both enforcement of the debt and the mortgage.—Dillworth v. Holmes Furniture & Vehicle Co., Ala., 73 So. 288.

96. **Tenancy in Common**—Ouster.—Where a tenant in possession purchases the land at a tax sale and takes a deed in his own name, claiming at the time of the sale and thereafter that he is the owner, and holds possession at all times under such claim and deed, he will be deemed to have ousted his co-tenant.—Butler v. Butler, Ind., 114 N. E. 760.

97. **Vendor and Purchaser**—Condition Precedent.—Where a vendor agreed to surrender security deed executed by the purchaser and accept a substitute, the agreement is not a condition precedent, and remedy for the vendor's breach is an action for damages.—Moore v. Turner, Ga., 91 S. E. 13.

98.——Estoppel.—Where grantee who assumed mortgage allowed foreclosure and stood idly by for two or three years, he cannot thereafter rescind on ground that he was deceived as to land and that grantor held no title; grantee's title not being questioned save by enforcement of mortgage.—Crowell v. Skillicorn, Neb., 160 N. W. 747.

99. **Wills**—Annuity.—Where an absolute and unqualified annuity is given, with instructions to invest a sum sufficient to purchase the annuity, the annuitant may elect to take the capital sum instead of having it invested in the annuity.—In re Cole's Estate, N. Y., 114 N. E. 785.

100.——Paramour.—While the law does not recognize the living together of a man and woman not legally married, it would not condemn a will made by her in his favor, even if he had been but a paramour.—In re Powers, N. Y. 162 N. Y. Supp. 828.